

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

v.

RIO SCHOOL DISTRICT,

OAH Case No. 2014100407 (Primary)

RIO SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2014070127

ORDER FOLLOWING PRE-HEARING
CONFERENCE AND DENYING
STUDENT'S MOTION TO AMEND

On March 9, 2015, Administrative Law Judge Adrienne L. Krikorian, Office of Administrative Hearings held a telephonic prehearing conference. Attorney Jane DuBovey appeared on Student's behalf. Attorney Sundee Johnson appeared on behalf of Rio School District. The PHC was recorded.

Based on discussion of the parties, the ALJ issues the following order:

1. Motion to Amend Student's complaint. Student filed an amended complaint on March 5, 2015, which OAH will consider a motion to amend the complaint. OAH did not receive a response from District.

An amended complaint may be filed when either (a) the other party consents in writing and is given the opportunity to resolve the complaint through a resolution session, or (b) the hearing officer grants permission, provided the hearing officer may grant such permission at any time more than five (5) days prior to the due process hearing. (20 U.S.C. §1415(c)(2)(E)(i)(II).) The filing of an amended complaint restarts the applicable timelines for the due process hearing. (§1415(f)(1)(B).)

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored. Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material

evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (See Cal. Rules of Court, rule 3.1332(c).) OAH considers all relevant facts and circumstances, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a party or witness as a result of a continuance; the impact of granting a continuance on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance; and any other relevant fact or circumstance. (See Cal. Rules of Court, rule 3.1332(d).)

District's complaint, which was filed on June 27, 2014, pertains to the appropriateness of three assessments it conducted in 2014. Student's original complaint, filed on October 8, 2014, pertains to actions by District and seeks damages dating back to October 8, 2012, including challenging the validity of the 2014 three assessments addressed in District's complaint. OAH consolidated the two matters on October 14, 2014. OAH also continued the consolidated hearing at the parties' request to March 16-19, 2015.

Student's amended complaint, at Paragraph 63, adds claims that District denied Student a free appropriate public education relating to individualized education program meetings on October 20 and 31, 2014, and the IEP that followed. Those claims allegedly arose within three weeks after the filing of Student's original complaint, but Student waited more than four months, and until the eve of the prehearing conference, to file an amended complaint.

Allowing Student to file an amended complaint on the eve of the consolidated hearing would result in resetting all timelines. District's case would be almost one year old before a decision is issued, which is contrary to public policy and not what Congress intended when it established due process timelines under the IDEA. Student has not demonstrated that either the Student's right to a speedy disposition or judicial economy will be served by further delaying this consolidated matter in order to address claims arising on October 20, 2014 and after. Those can be addressed in a separate complaint filed by Student, as they deal with new and different facts and a separate IEP.

Accordingly, the motion to amend Student's complaint is denied. The consolidated matter will proceed to hearing as set forth below.

2. Hearing Dates, Times, and Location.

The hearing shall take place on March 16, 17, 18, and 19, 2015 at the District's offices located at 3300 Cortez Avenue, Oxnard, California 93036. The hearing shall begin at 1:30 p.m. the first day of the hearing and at 9:00 a.m. all other days unless otherwise ordered.

The school district shall provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), the Rehabilitation Act

of 1973 (29 U.S.C. § 794 .), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities.

The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. A witness will not be regarded as unavailable for purposes of showing “good cause” to continue the hearing if the witness is not properly notified of the hearing date or properly subpoenaed, as applicable.

3. Issues. The issues at the due process hearing are listed below.

District’s Issue:

Were District’s April of 2014 psychoeducational, speech and language, and occupational therapy assessments properly conducted, such that Student is not entitled to independent educational evaluations at public expense?

Student’s Issues:

- a) Did District deprive Parents the opportunity to meaningfully participate in the development of Student’s individualized education program and deny Student a free appropriate public education during the 2012-2013 and 2013-2014 school years by:
 - 1) Failing to take into consideration Parents’ concerns;
 - 2) Pre-determining his educational program outside of the IEP process.
- b) Did District procedurally violate the Individuals with Disabilities Education Act and deny Student a free appropriate public education by:
 - 1) Failing to appropriately assess Student in all areas of suspected need, including psychoeducational, speech and language, occupational therapy; auditory processing, behavior, and recreational therapy?
 - 2) Failing to identify all areas of disability by not finding Student eligible for special education services as Other Health Impaired;
 - 3) Failing to develop appropriate goals in all areas of Student’s unique needs;
 - 4) Failing to include a clear statement of frequency and duration of related services in his individual education programs;

5) Failing to convene an IEP meeting to address the lack of expected progress in the 2012-2013 and 2013-2014 school years?

c) Did District substantively deny Student a FAPE during the 2012-2013, 2013-2014, and 2014-2015 school years through October 8, 2014, by:

1) Failing to offer and provide appropriate related services to address his unique needs and provide him with an educational benefit, including occupational therapy, speech and language, social skills, recreational therapy, educationally related mental health services, inclusion support, behavior intervention, and a supervised one-to-one behavioral aide; and

2) Failing to offer and provide appropriate specialized academic instruction in the areas of reading, writing and math, including intensive intervention with daily one-to-one instruction in a research based program?

4. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall use numbers to identify exhibits, but shall place the letter “S” or “D” in front of the exhibit to designate if it is a Student or District exhibit (for example, “S-5, S-6, or D-1, D-2). Each exhibit shall be internally paginated by exhibit, or all of a party’s exhibits shall be Bates-stamped. Each document with a separate date shall be separately identified. Each exhibit binder shall contain a detailed table of contents, including the date and title of the exhibit. The parties agree that they will exchange exhibits not later than noon on March 11, 2014, notwithstanding the requirements of Education Code section 56505, subd. (e)(7). At the hearing, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and a second exhibit binder for use by witnesses.

The parties shall meet and confer before the first day of hearing in order to delete duplicate exhibits from the exhibit binders and to consolidate exhibits where possible. The parties shall not serve exhibits on OAH prior to the hearing.

The parties shall exchange resumes or curriculum vitae for each witness who is expected to testify as to their professional credentials. Notwithstanding the requirements of Education Code section 56505, subd. (e)(7), the parties shall exchange resumes not later than 24 hours before the witness is scheduled to testify.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not included in the exhibit lists and not previously exchanged shall not be admitted into evidence at the hearing unless it is supported by written declaration under penalty of perjury, and the ALJ rules that it is admissible.

5. Witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or

eliminate the need for calling witnesses out of order. Neither party shall be permitted to call any witnesses not disclosed in the party's prehearing conference statement except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

Not later than noon on Wednesday, March 11, 2014, Student shall disclose to District any proposed witnesses, in compliance with the original Scheduling Order in Student's case, to the extent those witnesses were not identified in Student's PHC statement dated October 7, 2014 or not listed in District's PHC statement filed on March 5, 2015.

The parties are ordered to meet and confer by Wednesday, March 11, 2015 at 2:30 p.m. as to the schedule of witnesses. On the first day of hearing, the parties shall provide the ALJ with a detailed schedule which shall include an estimate of time, hour by hour, for each side's direct and cross examination. Each witness will only be called once to testify, except for rebuttal purposes, and both parties shall examine the witness on all issues when the witness is first called. The District shall have witnesses available in case agreement on a witness list is not reached. The parties shall be prepared at the end of each day of hearing to discuss the witnesses to be presented the next day and the time the testimony of each such witness is expected to take.

The parties are encouraged to review and shorten their witness lists prior to the hearing, bearing in mind that evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony.

6. Scope of Witness Examination. After the first direct and cross-examinations, each party shall be limited in examining the witness to only those matters raised in the immediately preceding examination.

7. Telephonic Testimony. Whether a witness may appear by telephone is a matter within the discretion of the ALJ. Cal. Code Regs., tit. 5, § 3082, subd. (g). Any party seeking to present a witness by telephone shall move in advance for leave to do so, unless the opposing party has stipulated that the witness may appear by telephone. The proponent of the witness shall provide the proposed witness with a complete set of exhibit binders from all parties, containing all of each party's exhibits, prior to the hearing; and shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. No witness will be heard by telephone unless all these requirements have been fulfilled.

8. Timely Disclosure of Witnesses/Exhibits. The parties agreed that, in the spirit of ongoing settlement negotiations, they will delay the exchange and disclosure of final witness lists and exhibits until Wednesday, March 11, 2015 at noon, notwithstanding the provisions of Education Code section 56505, subdivision (e)(7), which provides for disclosure of witnesses and exhibits “at least” five business days prior to the hearing.

9. Order of Presentation of Evidence. This matter is consolidated, and involves two parties. Subject to Paragraph 5 regarding limiting witnesses to one appearance, the order of presentation of evidence shall be as follows: District shall present its issues first. Student shall follow with its issues.

10. Motions. Student’s request to audiotape the hearing is granted. Both parties may audiotape the hearing subject to the following conditions: (1) Such audiotapes shall be used only for review and preparation; 2) the parties shall turn the recording device on and off at the same time that the ALJ is on and off the record; (3) the parties shall not play any part of the recording for a prospective witness; (4) the parties shall not use this recording in any subsequent due process hearing, and (5) the parties shall dispose of the unofficial recording when this matter (as well as any appeals) is concluded. The recording is not the official record and is permitted as a courtesy, unless otherwise ordered by the hearing ALJ.

Any further motions filed after this date shall be supported by a declaration under penalty of perjury establishing good cause as to why the motion was not made prior to or during the prehearing conference of March 9, 2015.

11. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

12. Conduct of Counsel and Hearing Room Decorum. Counsel, all parties, and all witnesses shall conduct themselves in a professional and courteous manner at all times. Cellular phones, pagers, recorders, and other noisemaking electronic devices shall be shut off or set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ.

13. Compensatory Education/Reimbursement. Any party seeking reimbursement of expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of expenditures, as part of its case in chief. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

14. Special Needs and Accommodations. At present neither party anticipates the need for special accommodation for any witness or party, or for translation services. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned calendar clerk at (916) 263-0880, the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 916-263-0880 as soon as the need is

made known. Additional information concerning requests for reasonable accommodation is available on OAH's website at <http://www.dgs.ca.gov/oah/Home/Accommodations.aspx>.

15. Hearing Will Be Closed To the Public.

16. Settlement. The parties are encouraged to continue working together to reach an agreement before the due process hearing. The parties shall inform OAH in writing immediately should they reach a settlement or otherwise resolve the dispute before the scheduled hearing. In addition, if a settlement is reached within five days of the scheduled start of the due process hearing, the parties shall also inform OAH of the settlement by telephone at (916) 263-0880.

IF A FULL AND FINAL WRITTEN SETTLEMENT AGREEMENT IS REACHED AFTER 5:00 P.M. THE DAY PRIOR TO HEARING, THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE REGARDING THE SETTLEMENT AT (916) 274-6035. THE PARTIES SHOULD ALSO LEAVE CONTACT INFORMATION SUCH AS CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY. THE PARTIES SHOULD SIMULTANEOUSLY FAX THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT THE FAXINATION LINE at 916-376-6319.

Dates for hearing will not be cancelled until the letter of withdrawal or signature page of the signed agreement has been received by OAH. If an agreement in principle is reached, the parties should plan to attend the scheduled hearing unless different arrangements have been agreed upon by the assigned ALJ. The assigned ALJ will check for messages the evening prior to the hearing or the morning of the hearing.

If the matter settles subject to board approval, in addition to a signed copy of the signature page of the settlement agreement as noted above, the parties shall submit a request for a status conference and provide the date of the next board meeting. The hearing dates will not be cancelled without this information.

17. Failure to comply with this order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

DATE: March 9, 2015

/s/
ADRIENNE L. KRIKORIAN
Administrative Law Judge
Office of Administrative Hearings